Rock-Tenn Company *and* Teamsters Local Union 728, International Brotherhood of Teamsters, AFL–CIO. Case 10–CA–26925

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On May 20, 1994, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and General Counsel filed exceptions and supporting briefs. The Charging Party filed a reply brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act, we do not rely on his citation of *Otis Elevator Co.*, 269 NLRB 891 (1984), because that decision was overruled in *Dubuque Packing Co.*, 303 NLRB 386, 390 fn. 8 (1991).

The judge noted that a decertification petition may not justify a refusal to bargain if a union's loss of majority is attributable to the employer's unfair labor practices. We note that the instant case does not involve a decertification petition filed with the Board but an antiunion petition given to an employer. However, we agree with the judge that the Respondent's withdrawal of recognition from the Union based on the petition was unlawful.

In agreeing with the judge that the Respondent's decision to subcontract and lay off bargaining unit employees is a mandatory subject of bargaining, Chairman Gould and Member Truesdale note that the layoff did not result from the elimination of the type of work bargaining unit employees performed but simply involved their replacement by another group of workers. Moreover, the Respondent has not shown that the reasons it gave for the subcontracting and layoff involve entrepreneurial decisions that are outside the range of bargaining or dictated by emergencies rendering bargaining impractical. *Torrington Industries*, 307 NLRB 809, 810–811 (1992). They further find that, even under the approach taken by the Third Circuit in *Furniture Rentors v. NLRB*, 36 F.3d 1240 (3d Cir. 1994), remanding in relevant part 311 NLRB 749 (1993), the Respondent's decision to subcontract and lay off drivers involves a mandatory subject of bargaining. They note that a primary reason that the Respondent chose to subcontract was to reduce its trucking expenditures, a substantial portion of which was labor costs. In this regard, the subcontracting report submitted into evidence by the Respondent stated that its total shipping expense for the 6-month period preceding its decision was approximately $902,000, including $307,000 for the cost of direct and indirect salaries and fringe benefits. The report further estimated the cost of using the subcontractor over the same period to be approximately $805,000. The desire to reduce costs involves factors that are within the Union's control and therefore are ''suitable for resolution within the collective bargaining framework.'' *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 214 (1964). By contrast in *Furniture Rentors*, the court noted that the respondent's labor costs were actually higher under its subcontract; thus, the court raised the issue of the respondent's underlying reason for subcontracting.

Member Cohen agrees with his colleagues that the decisions involved here are mandatory subjects of bargaining. However, he wishes to emphasize that the decisions do not fall within the ambit of ''category 2'' of *First National Maintenance v. NLRB*, 452 U.S. 666, 677 (1981) (*FNM*). Accordingly, rather than finding the decisions to be clearly mandatory, he applies the balancing test for ''category 3'' decisions under *FNM*. Applying that test, he notes that the decisions were motivated primarily by labor cost considerations, and were thus amenable to collective bargaining. He further notes that the decisions here did not represent a change in the scope and direction of the enterprise. Accordingly, the potential benefit of collective bargaining outweighs the burden that bargaining would place on the employer's entrepreneurial prerogatives. In these circumstances he agrees that the decisions involve mandatory subjects of bargaining.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rock-Tenn Company, Norcross, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(f) and reletter the subsequent paragraph.

''(f) Bypassing the Union and dealing directly with employees in the unit concerning matters over which it was obligated to bargain with the Union.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from the Union as the bargaining representative of the employees in the below-described bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union, on request, as the exclusive representative of the employees in the below-stated unit.

WE WILL NOT refuse to bargain in good faith with the Union by failing to timely notify the Union of our consideration of contracting out bargaining unit work or any other matters regarding terms and conditions of employment for bargaining unit employees.

WE WILL NOT tell our employees that we are going to lay off unit employees without first negotiating with the Union to conclusion, or to impasse, regarding that issue.

WE WILL NOT bypass the Union and deal directly with our employees in the unit concerning matters over which we are obligated to bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT lay off bargaining unit employees without first bargaining with the Union.

WE WILL, on request, bargain in good faith with Teamsters Local 728, International Brotherhood of Teamsters, AFL–CIO, as the exclusive bargaining representative of our employees in the unit described below and, if an understanding is reached, embody the understanding in a written, signed contract.

> All drivers employed by Respondent at its facility at 4444 South Old Peachtree Road, Norcross, Georgia, but excluding all production employees, clerical employees, sales employees, mechanics, professional employees and guards and supervisors as defined in the Act.

WE WILL offer immediate reinstatement to Gary Spence, Howard E. Binkly, Harold Fields, Ricky Howard, Kenneth McCoy, Phillip McCoy, David Mason, and Julian C. Walton Jr. to their former positions and WE WILL make Spence, Binkly, Fields, Howard, Kenneth and Phillip McCoy, Mason, and Walton whole for any loss of earnings by reason for our layoff of them, with interest, severing all contractual relations, if necessary with others utilized to perform the work formerly performed by the bargaining unit employees.

WE WILL notify each of them that we have removed from our files any reference to their layoffs and that the layoffs will not be used against them.

WE WILL communicate orally and in writing to officials of the Union that we have rescinded our decision to withdraw recognition of the Union and, instead, inform the Union that we will honor our bargaining obligation.

WE WILL reopen our Norcross, Georgia trucking operation to the status quo ante as of July 31, 1993.

ROCK-TENN COMPANY

Mary L. Bulls, Esq., and *Leslie Troope, Esq.*, for the General Counsel.

Larry E. Forrester, Esq., and *Stephen W. Mooney, Esq.*, of Atlanta, Georgia, for the Respondent.

James D. Fagan, Esq., of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Atlanta, Georgia, on January 27 and 28, 1994. The charge was filed on August 9 and amended on August 27, 1993. An amended complaint issued October 20, 1993.

Respondent, Union, and the General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On consideration of the entire record and briefs filed by the parties, I make the following

FINDINGS OF FACT

JURISDICTION AND LABOR ORGANIZATION

Respondent admitted that it is a Georgia corporation with a place of business in Norcross, Georgia, where it is engaged in the manufacture of corrugated paper products; that during a representative calendar year it sold and shipped from its Norcross, Georgia facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia; and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act).

Respondent admitted that the Charging Party (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admitted that the following described unit is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers employed by Respondent at its facility at 4444 South Old Peachtree Road, Norcross, Georgia, but excluding all production employees, clerical employees, sales employees, mechanics, professional employees, guards, and supervisors as defined in the Act.

I.

Respondent admitted that the employees in the above-described bargaining unit voted to select the Union as their bargaining representative in an NLRB-conducted election on June 20, 1992, and that the Union was certified as bargaining agent on June 30, 1992.

Former Transportation Manager Dan Norsworthy testified that he first learned of the Union's organizing campaign with Respondent's employees in mid-May 1992. Norsworthy attended several management meetings where the Union was discussed. The first of those was around mid-May 1992.

Present in the meeting were General Manager Springer, Plant Manager Lanew Barry, and Planning Manager Brannon Sims.

Ken Springer conducted the meeting. Norsworthy testified:

> He did not want me to do anything to help the drivers. A lot of times I have drivers that had several little problems with logs that wasn't—they wasn't up to date with. I was not to help them on that. I was to watch the logs extremely close.
>
> When it comes to the dispatching he did not want me to give—going towards the end of that right there we used to let the drivers pick and choose. Starting with the senior driver and work our way down. No more of that.
>
> One specific driver, David Mason, normally comes in early on Thursdays to get his check. I was told to put him on a layover where he could not get in and get his check. That the privileges that we gave them was going to be taken away.
>
> . . . .
>
> Mr. Springer wanted to get rid of the troublemakers and he had named Lynn Rhodes as one, David Mason as one and he had made the comment that stuck out pretty good in my mind. That if you've got a dog that's barking you've got to cut off its head, meaning Lynn Rhodes. That we couldn't just cut the tail off. If you cut the tail off he'll keep barking.

Norsworthy recalled a conversation with Springer in June 1992:

> He had told me that this was pretty much—well, going on the same conversation we had earlier about not helping the drivers. He said that he wanted to make these drivers lives miserable because in one year's time he wanted their—he wanted the Union vote out. I guess the way he put it exactly was: If we make their lives miserable for one year, they will vote the Union out.

Dan Norsworthy recalled another conversation with Springer after a settlement of NLRB charges in July 1992, during a meeting including Springer, Lanew Barry, and Norsworthy. Springer said that he was ''having to bring the damn drivers back,'' and ''that when they come back here in the lines that he didn't want them here more than a week.''

After the NLRB election which was won by the Union, Norsworthy was in a meeting with Ken Springer, Lanew Barry, and Brannon Sims. Everyone was instructed to write down the employees they felt voted for the Union. Norsworthy recalled that originally they felt that Lamar McPherson, Phillip McCoy, Ken McCoy, Junior Walton, and Ricky Howard would vote against the Union.

Norsworthy recalled that after the election he and Plant Manager Lanew Barry were watching the drivers to see who gathers up in one little pile and who was in the other little huddle. They noticed that Phillip McCoy, Cecil Moreland, James Klineheis, a driver named Buck, and Ken McCoy formed one group. After the election count, Phillip McCoy appeared very upset about the Union being voted in. Norsworthy and Barry were watching Phillip McCoy because it was felt he did not vote for the Union. However, they noticed there were too many in the group with Phillip McCoy because only three people had actually voted against the Union.

One of the drivers told Dan Norsworthy which employees voted for and which employees voted against the Union. Norsworthy discussed that with Springer. One of the votes for the Union came from J. R. ''Ricochet Rabbit'' Walton. Walton was Respondent's observer to the election and Respondent's managers were surprised to learn that Walton had voted for the Union. Also, Norsworthy testified that Springer was informed that Lamar McPherson had voted for the Union and Springer was very upset about McPherson.

Dan Norsworthy left Respondent on July 22, 1992. He testified that he was asked to resign.

Findings

I credit the testimony of Dan Norsworthy on the basis of my observation of his demeanor and in consideration of the full record. Norsworthy's testimony was not rebutted.

II.

Respondent admitted that the Union requested that it bargain regarding its decision to subcontract bargaining unit work on July 6, 1993.

Respondent denied that it unilaterally subcontracted all bargaining work to Silver Eagle Transport, Inc. and that it has failed to bargain in good faith with the Union.

Respondent denied that it unlawfully withdrew recognition of the Union on July 13 and that it bypassed the Union and bargained directly with its employees on July 14, 1993.

Respondent admitted that it laid off employees Howard E. Binkly, Harold Fields, Ricky Howard, Kenneth McCoy, Phillip McCoy, David Mason, and Julian C. Walton Jr. on July 31, 1993.

Respondent denied that it laid off Binkly, Fields, Howard, Kenneth McCoy, Phillip McCoy, Mason, and Walton because of their union and protected concerted activities. Respondent denied that it laid off Binkly, Fields, Howard, Kenneth and Phillip McCoy, Mason, and Walton without bargaining with the Union.

Executive General Manager and Vice President of Corrugator Division John Morrison testified he was involved in negotiation sessions with the Union on six occasions between July 29 and December 13, 1992. Morrison testified that Respondent made a proposal that would enable Respondent to subcontract its trucking operations. That proposal was made in the form of a management-rights clause and the proposal was made in either the July 29 or July 30, 1992 negotiation session.

The proposed management-rights clause stated (in part):

> Except to the extent expressly abridged by a specific provision of this Agreement, the Company reserves and retains all of its inherent rights to manage the business, as such rights existed at the commencement of its operations.
>
> Without limiting the generality of the foregoing, rights to be exercised solely, exclusively and at the discretion of management include, but are not limited or confined to, the right to . . . subcontract all or any part of its operation;

On October 7, 1992, the Union wrote Respondent:

> I want to let you know where the union is at in the current negotiations. We had a meeting on Sunday and discussed the company's final offer with the men. The unanimous decision was that the company's offer was not acceptable.

Executive General Manager John Morrison testified there was a negotiation session at the Federal Mediation Center around December 15, 1992. The parties met separately. The mediator came to Respondent's representatives and said that the Union proposed they have a union bulletin board in Respondent's plant. Respondent informed the mediator that was agreeable.

Further meetings were scheduled in March and April 1993. Those meetings were canceled before the scheduled dates.

The next negotiation session was held on July 6, 1993. That meeting was also held at the Federal Mediation Center. At that meeting Respondent told the Union they were considering moving out of the trucking business and going to a dedicated carrier operation. Respondent informed the Union that economics, risk of liability, and DOT regulations were factors in its desire to get out of trucking. Respondent said that it expected savings of $200,000 a year by getting out of trucking. Respondent said that it was willing to negotiate on cause and effect. Union Attorney Fagan asked for some additional information.

The Union wrote Respondent on July 7, 1993:

> This letter is to confirm the announcement made by you to the Union in negotiations today that Rock Tenn Company is considering discontinuing its Norcross, GA corrugated trucking operations effective August 1, 1993 and contracting out this work to Silver Eagle. You stated that this decision was not final that even if the Union agreed to cut the employees' wages and benefits in half that such concessions would not save the employees' jobs because contracting out the work would avoid the risks inherent in a trucking operation.
>
> This letter is a formal demand for bargaining on the subjects of both the decision to discontinue the trucking operations and the effects of that decision.

The letter went on to demand immediate bargaining and the production of documents.

As shown below, Gary Spence testified that he talked with Respondent Planning Manager Brannon Sims on July 8. After Spence told Sims that he heard the drivers would be laid off at the end of July, Sims confirmed to Spence that he had heard the same thing.

Sims admitted talking with Spence on July 8 but Sims denied that he confirmed that the drivers were going to be laid off.

On July 9, 1993, Respondent replied to the Union's July 7 letter:

> This letter is in response to your request for information concerning collective bargaining issues. While it is the Company's position that it has no duty to bargain over the decision to cease its trucking operation, the Company will do so and will provide herein information pertinent to that decision. Attached is a reproduction of ATTACHMENT # 1 to your letter of July 7, 1993 with responses to your questions regarding Norcross trucking operations.

Upon Union Attorney Fagan receiving documents requested from Respondent, the Union set up another negotiating meeting through the Federal mediator for July 13, 1993.

Robert Stanifer testified that Respondent did not notify the Union that it had made a final decision to cease its trucking operation. About 2 or 3 days before a negotiation session planned for July 13, 1993, some employees phoned Assistant Business Agent Stanifer that Respondent had called a meeting of the employees to notify them it was ceasing its trucking operation.

On the morning of July 13 Respondent received the following:

> Rock tenn [sic],
>
> To whom it may concern. I feel like the decision that has recently been made, besides the economy end of it—has been because of the underhanded tactics that was used on the part of some of the union members. The Union flyers have costed Rock tenn bad publicites [sic]—which in turn has cost them some very good long standing customers that we could no longer haul to. To my knowledge the union drivers that are still with Rock Tenn, had no part of these things. Myself, as a non-union driver, feels there is no need for a union at Rock tenn and I hope that the rest of the drivers feels as I do. Attached to this letter are the signatures of the drivers that feel this way.
>
> Sincerely yours
> /s/ Buck Fields
>
> Drivers,
>
> Please read the attached letter. If you agree with me, please sign your name below: (this means we no longer need a union.)
>
> 1. /s/ (Buck) Harold Fields
> 2. /s/ Kenneth McCoy
> 3. /s/ Phillip McCoy
> 4. /s/ Julian C. Walton Jr.

Respondent met with the Federal mediator at the Federal Mediation Center later on July 13, at the time scheduled for the negotiation session. Respondent told the mediator that a majority (four out of seven drivers) in the bargaining unit had signed the above document and the Union no longer represented a majority of the employees. On that basis Respondent refused to meet with the Union.

When the union members of the negotiation committee met at the Federal Mediation Center office on July 13, 1993, they were escorted into an office where they were told that Respondent was refusing to meet with them on the ground that the Union no longer represented a majority of the employees.

Respondent wrote the Union on July 13, 1993:

> Rock-Tenn Company now has a good faith doubt, based upon objective considerations, that the majority in the unit certified in NLRB Case No. 10–RC–1450 wish to continue to be represented by the Union. It

would, therefore, be inappropriate for Rock-Tenn Company to continue to negotiate with the Union as the exclusive representative of these employees.

Executive General Manager Morrison testified that Respondent made a decision on July 14, 1993 to accept Silver Eagle's dedicated carrier proposal.

Rick Howard testified that he attended a meeting with Respondent and the truckdrivers on July 14, 1993. John Morrison conducted the meeting. He told the drivers that Respondent had made the decision to close down trucking at the end of the month due to cost and liability. Morrison told the drivers they would get severance pay based on the amount of time they had with Respondent. Also drivers would receive pay for outstanding vacation time if they did not start trouble or damage equipment. Respondent would carry insurance for the drivers through August.

Howard Binkly testified that he attended the July 14 meeting. Morrison told the drivers that Silver Eagle was going to do the hauling for Respondent after July 31 and Respondent could save $80,000 in insurance and benefits. Morrison said that the transportation department would be eliminated. There was a question as to whether any drivers would be retained and Morrison said there would be no drivers retained. Morrison told the drivers that they would receive severance pay if they stayed on the job until July 31.

John Morrison testified that Respondent had considered subcontracting its trucking operations for several years beginning around 1989. In 1991 and 1992, they went through a number of proposals with carriers. Those negotiations with carriers continued in 1992 and into 1993. In 1992 and 1993, several carriers including Silver Eagle Transport, Werner, and Builders were hauling some freight out of Respondent's Norcross plant.

On March 19, 1993, Respondent received a dedicated service proposal from Silver Eagle. Also, in 1992 and 1993, Respondent received dedicated service proposals from other trucking companies including MS Carriers, McClinton, and Werner.

Silver Eagle's president, Steve Silverman, testified that Silver Eagle is a 48-state ICC common truck carrier headquartered in Jacksonville, Florida, with terminals in Jasper, Florida; Albany, Atlanta, and Augusta, Georgia; and Greensboro, North Carolina. The Atlanta terminal started operations in December 1992. Before that time, in mid-1992, Silver Eagle started some hauling for Respondent as a common carrier.

Silver Eagle's March 19 proposal included a total estimated cost to Respondent of $1,922,672.38, based on a $0.949-per-mile cost and a 2,025,024-mile-per-year estimated total mileage. Silver Eagle specified that it could initiate service within 60 days from acceptance of its proposal.

On June 9, 1993, the following memo was sent interoffice at Respondent from Evan Hardin to Dave Nicholson. John Morrison testified that Dave Nicholson is Respondent's chief financial officer. Evan Hardin is Respondent's assistant treasurer.

> I have finished my analysis of the Norcross Corrugator trucking operation. Unlike the results of a similar study in FY'91, this study recommends the outsourcing of these shipping operations. We can provide strong customer-oriented deliveries at a lower cost than we currently experience while avoiding the significant risks associated with over-the-road hauling. I first analyzed this shipping operation in 1991. That study compared our internal cost per mile with point to point rates available from common carriers. I concluded that shifting to outside carrier would cost an additional $500,000 annually. Rather than incur this expense we invested resources in the management and safety of our fleet. It was felt this action would minimize both our probability of having a major accident and our fiscal culpability in the event such an accident did occur. To date we have been fortunate and have avoided a major accident. However, as our operations become larger, (this year our shipping will exceed 2 million miles) we realize the statistic could eventually catch up with us.
>
> The recent proliferation of Dedicated Carrier operations and more significantly, two specific carriers expansion into the Atlanta market prompted our reevaluation of the Corrugator trucking operation. A dedicated carrier service is substantially different from the point to point service I analyzed in 1991. Under a dedicated arrangement one carrier handles all our shipping requirements. This affords the carrier economies of scale while allowing our operation to refocus its internal resources on manufacturing. Additionally, the dedicated carrier is purely a shipping operation. We struggle to comply with DOT regulations and maintain a safe and efficient fleet, where dedicated carriers have the resources and experience to handle these issues in their ordinary course of business. Unlike 1991, a switch to outside service will not involve any additional cost.
>
> The attached analysis calculates the fully absorbed cost for our existing shipping operation and low cost dedicated carrier proposal. The inhouse shipping analysis is a fairly conservative calculation of total shipping expense. Cost of Assets, Divisional Expense and Insurance could all have been significantly higher. Additionally, the dedicated service cost was adjusted for backhauling allowances, delays, local deliveries and other complications. Despite these complications dedicated service is clearly the more cost effective alternative and would save nearly $200,000 annually. The avoidance of accident liability is a benefit over and above the cost savings and as this liability has been the primary issue for three years, I recommend without reservation a move to dedicated carrier service.

Attached to Hardin's June 9 memo were documents showing Respondent's 6-month shipping expense of $902,091; and a projected cost for the same 6-month period for total shipping expense under the Silver Eagle proposal of $805,325. The 6-month period used in Hardin's expense documents ended on March 31, 1993.

John Morrison testified that he contacted Silver Eagle on July 14, 1993, and, in the absence of Steve Silverman, he talked with David Teichert. Morrison told Teichert that Respondent wanted to contract with Silver Eagle to start dedicated carrier service on August 1, 1993.

Steve Silverman was on vacation out of the country from July 2–18, 1993. When he returned, he and Morrison agreed to a dedicated carrier contract starting August 1, 1993. Sil-

verman testified that even though he started his dedicated carrier service to Respondent on August 1, they did not succeed in signing the contract until mid-November 1993.

Silverman told John Morrison on July 19 that he might not be able to be up to full speed on August 1. In their dedicated carrier proposal to Respondent, Silver Eagle indicated they would need a minimum of 60 days after contract to start dedicated carrier service.

Respondent terminated its trucking operations and laid off the remaining drivers on July 31, 1993. Those drivers were Howard E. Binkly, Harold Fields, Ricky Howard, Kenneth McCoy, Phillip McCoy, David Mason, and Julian C. Walton Jr.

Findings

(a) *Was subcontracting a mandatory subject for negotiations*

The first issues deal with Respondent's decision to subcontract all its bargaining unit work and whether Respondent had an obligation to bargain over that decision and its effect on unit employees.

As shown here, the credited evidence proved that on July 6, 1993, during a negotiation session with the Union, Respondent announced it was considering subcontracting its trucking operations with a dedicated carrier. Respondent told the Union that it would bargain over that decision and its effects. Although Respondent had been considering the subcontract possibility since 1989, July 6, 1993, was the first notice to the Union. On July 7, the Union requested information regarding the subcontract considerations. By letter dated July 9, Respondent agreed to the Union's request. In that letter Respondent expressed that it was not obligated to bargain over the subcontracting decision but agreed that it would bargain about that subject.

Also on July 7, 1993, Respondent's paralegal, Karen S. Benak, sent a draft agreement for contract carriage to Silver Eagle Transport.

On July 8, 1993, Respondent's planning manager told driver Gary Spence that he too had heard the rumor that Respondent planned to lay off all truckdrivers at the end of July. Later that day the planning manager confirmed that General Manager Springer agreed that the drivers would be laid off at the end of the month.

As shown in more detail below, I was persuaded that Spence testified truthfully. I was impressed with his demeanor. Portions of Spence's testimony, including his conversation with Transportation Manager Debby Redding when he returned around July 20 or 21 to pick up his final paycheck were not rebutted. To the extent of conflicts, I credit Spence and do not credit Planning Manager Brannon Sims. Spence's testimony illustrated that by July 8, Respondent had made a final decision to subcontract its trucking operations and lay off its truckdrivers.

Assistant Business Agent Robert Stanifer testified that some employees phoned him 2 or 3 days before the July 13 scheduled negotiation session, and told him that Respondent had called a meeting of employees to notify them it was eliminating its trucking operation. Absent other evidence I would not consider that testimony as probative of whether Respondent made the subcontract decision before July 13. Stanifer's testimony constitutes hearsay as to that issue. However, there was other evidence including the above-mentioned testimony of Gary Spence and the language of a petition of four employees to rescind their support for the Union, illustrating that Respondent had made the decision to lay off all bargaining unit employees before July 13.

That July 13 letter which Respondent accepted as a petition to reject the Union, expressed that the drivers were aware that Respondent had decided to subcontract the trucking operation:

> To whom it may concern. I feel like the decision that has recently been made, besides the economy end of it—has been because of the underhanded tactics that was used on the part of some of the union members.

On July 14 Respondent notified its truckdrivers that it had decided to subcontract all bargaining unit work and lay off all truckdrivers on July 31.

Did Respondent have an obligation to bargain with the Union over its decision to subcontract its trucking operations?

> [T]he critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives. [*Otis Elevator Co.*, 269 NLRB 891, 892 (1984); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).]

In *Furniture Rentors of America*, 311 NLRB 749, 751 (1993), the Board found that Respondent's decision to subcontract its delivery operation and lay off all seven drivers, failed to involve a change in the scope and direction of the enterprise and that the subcontracting decision ''was not a core entrepreneurial decision which is beyond the scope of the bargaining obligation defined in the Act.''

The Board in *Torrington Industries*, 307 NLRB 809 (1992), found that an employer's laying off both drivers in a two-man unit and replacing them with a nonunit employee and independent contractors did not involve a change in the scope, nature, or direction of the business and were amenable to collective bargaining. The employer's failure to bargain about the decision and the layoffs was unlawful. The Board in *Torrington*, at 810 distinguished *Dubuque Packing Co.*, 303 NLRB 386 (1991), as involving a relocation of unit work:

> We made clear, however, that that particular burden-shifting test was devised for determining the nature of relocation decisions, and we did not purport to extend it to other types of management decisions that affect employees.

Unlike *Furniture Rentors*, supra, where the Employer subcontracted because he was unhappy with the work performance and conduct of unit drivers, Respondent offered evidence that three factors influenced the decision to subcontract: (1) costs, (2) potential liability from accidents, and (3) DOT regulations. Neither item (2) or (3) could be influenced by negotiations. According to Respondent, it is un-

likely that negotiations could affect item (1) since Respondent's anticipated savings of $200,000 per year could not be offset by the unit employees unless they were willing to give up wages in excess of $25,000 per year per driver.

Respondent argued that it proposed contract language that permitted it to subcontract its operations from the first negotiation session on July 29, 1992. Subsequently it took that position throughout negotiations. As to the act of subcontracting, Respondent argued that it had exhausted its obligation to bargain on that issue and cited *Dubuque Packing Co*., supra at 391.

However, until July 6, 1993, Respondent failed to propose the actual subcontracting of all unit work. Respondent did nothing more than propose a broad management-rights clause which would permit it to subcontract unit work.

Respondent argued that negotiations could not have affected its subcontract decision because of the $200,000 it would save each year under the subcontract to Silver Eagle. However, the Union had just started examination of documents relevant to that contention when Respondent withdrew recognition. The Union never had the opportunity to fully explore Respondent's alleged justification to subcontract. The Union did not have the opportunity to negotiate intelligently over that issue. Respondent's short notice to the Union after it had considered the issue for several years, gave the Union no real opportunity to bargain.

The Union argued that Respondent failed to give the Union proper notice or to bargain in good faith regarding its decision to subcontract the trucking operation. *Intersystems Design Corp.*, 278 NLRB 759 (1986); *Emhart Industries*, 297 NLRB 215 (1989).

Respondent had considered subcontracting its trucking operations since 1989. However, July 6, 1993, was the first occasion of Respondent notifying the Union of its consideration of subcontracting the trucking operations.

Respondent argued that the Union canceled two earlier negotiation sessions in 1993, and that resulted in the Union not learning of Respondent's consideration of subcontracting until July 6, 1993. However, Respondent had considered subcontracting since 1989. It had reviewed Silver Eagle's March 19, 1993 proposal. The subcontracting was recommended on June 9, 1993 (see memo quoted in sec. II). There was no showing of why Respondent did not notify the Union of its consideration to subcontracting before the July 6 scheduled negotiating session. I disagree with Respondent's contention that it informed the Union at the earliest possible opportunity.

From the time of its first notice of the subcontract issue on July 6, the Union had less than sufficient time to prepare itself and negotiate over that question. Even if Respondent had not withdrawn recognition, the subcontract was set to start on August 1—less than a month after July 6. Moreover, on July 7, with no notice to the Union, Respondent sent a draft contract to Silver Eagle. On July 13, 1993, 1 week after it first notified the Union, Respondent withdrew recognition and refused to continue negotiations. *Owens-Corning Fiberglas*, 282 NLRB 609 (1987); *Furniture Rentors of America*, supra; *SMCO, Inc.*, 286 NLRB 1291 (1987).

> In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5), we do not imply that an employer may not lawfully fully develop a plan for a change in working conditions before announcing to the union its intention to implement that plan. If such an announcement is made sufficiently in advance of implementation to provide time for meaningful bargaining and the union fails to request bargaining, the employer may lawfully implement the plan. The gravamen of the Respondent's offense here was that, according to testimony credited by the judge, the management representatives who announced the plan to union representatives on August 6 also made statements indicating that nothing could be done about the plan. We further note the absence of evidence showing that those management representatives lacked authority to communicate the intent of Respondent's headquarters regarding implementation of the plan. [*Owens-Corning Fiberglas*, supra at 609 fn. 1.]

Here too, Respondent's spokesmen made statements indicating that nothing could be done about its plan to subcontract the trucking operations.

The instant matter is similar to *Owens-Corning Fiberglas*, supra, *Furniture Rentors of America*, supra, and *Torrington Industries*, supra. Respondent is involved in the manufacture of corrugated paper products and its decision to subcontract its trucking operation did not constitute a core entrepreneurial decision which was beyond the scope of the bargaining obligation defined in the Act. Respondent failed to provide the Union sufficient time to become knowledgeable and engage in meaningful bargaining before the scheduled implementation date of August 1, 1993. I find that Respondent did have an obligation to negotiate with the Union over its subcontracting decision. *Torrington Industries*, supra; *Furniture Rentors of America*, supra; *Owens-Corning Fiberglas*, supra.

(b) *Was it unlawful to tell its driver, Gary Spence, that all drivers would be laid off*

Was it an unfair labor practice for Respondent to tell its employee that the drivers would be laid off at the end of July at a time when Respondent was holding out to the Union that it was agreeable to bargain over that issue? If so, was the Respondent's unfair labor practices of the type of violations which would improperly affect the bargaining relationship?

As shown above on July 6 and again by a letter of July 9, Respondent told the Union that it would bargain about its consideration of subcontracting its trucking operation. On July 8, Planning Manager Sims told employee Gary Spence that he (Sims) had heard that the drivers would all be laid off at the end of July.

By letting the employees know that it had decided to subcontract the trucking operations and lay off the employees, Respondent caused concern as to whether the Union was jeopardizing the employees' jobs. *Guerdon Industries*, 218 NLRB 658 (1975).

I find that the record illustrates that Respondent had made the decision to lay off the drivers and had advised its employee of that decision before the employees wrote Respondent that they did not support the Union. That information had a likely impact on the drivers. In fact the petition to rid themselves of the Union shows that decision had a definite impact on those drivers.

I find that Respondent engaged in additional violative conduct when its planning manager informed a member of the

bargaining unit that he had also heard that all the drivers would be laid off at the end of July. By that action, Respondent undercut the Union by providing the employees with information that was inconsistent with the position Respondent had advanced to the Union.

Respondent's unfair labor practices had the likely effect of influencing unit employees to petition for withdrawal of recognition to the Union.

> It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). Direct dealing need not take the form of actual bargaining. As the Board made clear in *Modern Merchandising*, 284 NLRB 1377, 1379 (1987), the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode ''the Union's position as exclusive representative.'' See also *Alexander Linn Hospital Assn.*, 288 NLRB 103, 106 (1988), enfd. sub nom. *NLRB v. Walkill Valley General Hospital*, 866 F.2d 632, 636 (3d Cir. 1989); *Obie Pacific, Inc.*, 196 NLRB 458, 458–459 (1972). Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions—particularly one as controversial as a workplace smoking policy—plainly erodes the position of the designated representative. [*Allied-Signal, Inc.*, 307 NLRB 752, 753–754 (1992); fns. omitted.]

Planning Manager Sims' comments to Gary Spence did not involve solicitation. Nevertheless, by informing Spence that he had heard that all the drivers would be laid off at the end of the month, Sims undercut the Union's status and authority and created a tendency for the employees to reject the Union.

In *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992), the Board found that the employer violated Section 8(a)(5) by announcing the implementation of a unilateral change where no impasse was reached in bargaining. The Board stated:

> The damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby ''emphasizing to the employees that there is no necessity for a collective bargaining agent.'' *Famous-Barr Co. v. NLRB*, 326 U.S. 376, 384–386 (1945).

Here to an even greater extent the message to Gary Spence and all drivers, had the impact of showing that Respondent was bypassing the Union and that by selecting the Union the drivers had endangered their jobs.

(c) *Did Respondent illegally withdraw recognition*

The next question regards Respondent's withdrawal of recognition. In determining whether Respondent unlawfully withdrew recognition of the Union on July 13, 1993, I must question whether Respondent engaged in those alleged actions in an atmosphere of unfair labor practices. *NLRB v. Mar-Len Cabinets*, 659 F.2d 995 (9th Cir. 1981); *Hercules Automotive*, 285 NLRB 944 (1987); *Guerdon Industries*, supra.

A decertification petition may not justify a refusal to bargain if a union's loss of majority is attributable to the employer's unfair labor practices. *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); *Garrett Railroad Car*, 255 NLRB 620 (1980).

> We would also be constrained to dismiss the withdrawal-of-recognition complaint allegation, even where Respondent, in fact, had committed other unfair labor practices prior to its withdrawal of recognition, if it could be said that those other unfair labor practices were not of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. It is clear here, however, that Respondent's unilateral announcement and implementation of the incentive plan and its threat to halt the plan should the Union negotiate a wage increase were exactly the types of violations which would improperly affect the bargaining relationship so as to negate the legality of the later withdrawal of recognition. [*Guerdon Industries*, supra at 661; fn. omitted.]

The General Counsel argued that Respondent did not withdraw recognition in an atmosphere free of unfair labor practices because Respondent had not offered the Union a reasonable opportunity to bargain over the subcontracting issue and Respondent's actions contributed to the employees disaffection with the Union. The General Counsel also argued that Respondent bargained directly with unit employees on July 14. *Xidex Corp.*, 297 NLRB 110 (1989); *Guerdon Industries*, supra at 660–662; *Hearst Corp.*, 281 NLRB 764 (1986).

I find that Respondent engaged in conduct in violation of the Act before July 13, 1993, when it failed to give the Union proper notice of its consideration of subcontracting its trucking operations and when it told its employee Gary Spence that it would layoff all unit employees at the end of July. In view of the full record and my findings herein, it is apparent that Respondent's unfair labor practices before July 13, were ''of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.'' *Guerdon Industries*, supra at 661.

Respondent violated Section 8(a)(5) and (1) of the Act, by failing to give the Union proper notice of its plan to subcontract is unit work and by its comments to Spence and, in view of the relationship shown between that action and the employees letter to withdraw support for the Union, I find that Respondent engaged in conduct in violation of Section 8(a)(5) and (1) by withdrawing recognition of the Union on July 13, 1993. *Guerdon Industries*, supra.

(d) *Did Respondent illegally negotiate with employees on July 14*

On July 14, Respondent met with its bargaining unit drivers and informed them of the impending layoff. In view of my findings herein, at that time those employees were rep-

resented by the Union. During that July 14 meeting the drivers made requests to preserve their jobs and Respondent offered severance pay and documents from the drivers' personnel file provided the drivers continued to work and did no damage to Respondent's equipment. *Stanford Realty Associates*, 306 NLRB 1061, 1067 (1989). That constitutes direct bargaining with employees. At that time, as shown above, the Union remained the exclusive collective-bargaining representative of the truckdrivers. Respondent's direct negotiation with the employees constituted conduct in violation of Section 8(a)(1) and (5). *Kirby's Restaurant*, 295 NLRB 897, 901 (1989); *Fabric Warehouse*, 294 NLRB 189 (1989).

(e) *Did Respondent violate Section 8(a)(5), (3), and (1) by laying off unit employees*

As shown above, Respondent engaged in illegal conduct by withdrawing recognition on July 13, 1993. As shown above, on July 6 and again on July 9, Respondent agreed that it would negotiate its subcontract decision and the effects of that decision on unit employees. Before negotiating further Respondent withdrew recognition on July 13, 1993. Subsequently, without bargaining, Respondent laid off all unit employees. I find that Respondent engaged in conduct in violation of Section 8(a)(5) by laying off all bargaining unit employees on July 31, 1993, without bargaining with the Union about the subcontract decision and about the effects of Respondent's decision to subcontract unit work.

As to the alleged violation of Section 8(a)(3) by laying off the unit employees because of its drivers' protected union activities, I shall first examine whether the General Counsel proved a prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The record established that a majority of Respondent's truckdrivers engaged in union activities.

The record shows without dispute that Respondent recognized and bargained with the Union from mid-1992 until July 13, 1993.

The record also proved without dispute, Respondent's union animus to its employees' union activities. The testimony of Dan Norsworthy was not rebutted as to those matters and I credit his testimony on the basis of his demeanor and the full record.

The petition submitted to Respondent on July 13 which was signed by four of the truckdrivers, illustrated that Respondent's subcontracting and lay off of the drivers had ''the effect of discouraging membership in'' the Union.

I find that the General Counsel proved, prima facie, that Respondent was motivated by its drivers' union activities in terminating its trucking operation and laying off the unit employees. *Electromedics*, 299 NLRB 928 (1990).

In light of *Wright Line*, supra, I shall examine the record as to whether Respondent proved it would have laid off its truckdrivers in the absence of their protected union activities.

Respondent offered unrebutted evidence that its decision to subcontract its trucking operation was based on its determination that it would save money and reduce possible liability by subcontracting its trucking operation. As shown above, at the time Respondent broke off negotiations with the Union, the Union had just started consideration and negotiations regarding the subcontracting and laying off of drivers question.

Respondent offered evidence showing that it would have subcontracted its trucking operation and laid off the drivers in the absence of the drivers' protected union activities. Perhaps, if the Union had been able to exhaust its research into that issue it could have prevailed but such a showing was not included in this record. For that reason I find that Respondent proved it would have laid off the drivers in the absence of their protected activities and I find that the record failed to show that Respondent laid off the drivers in violation of Section 8(a)(1) and (3) of the Act.

III.

Respondent admitted that it discharged employee Lamar McPherson on June 22, 1993.

Respondent denied that it discharged McPherson because of his union and protected concerted activities.

Respondent denied that its unilateral subcontracting of unit work caused the constructive discharge of unit employee Gary Spence.

Lamar McPherson:

As shown above, Lamar McPherson was elected as a member of the union negotiating committee on June 20, 1993. McPherson was elected along with Ricky Howard. Before then drivers Gip Miller and Lynn Rhodes served on the union negotiating committee.

McPherson left on a trip for Respondent on June 21. He left the terminal at 5 a.m. and drove to Dalton, Georgia. From there he drove to Gallatin, Tennessee. McPherson then drove to Stevenson, Alabama, and left there around 2 p.m. McPherson drove to Cartersville, Georgia, arriving at 5 to 5:15 p.m. McPherson testified that he was out of time (i.e., under DOT regulations he was limited to 10 hours driving time each day). McPherson had a friend, Bob Buchanan, drive his truck to the New Harmony Baptist Church where McPherson left the truck. McPherson testified that Bob Buchanan worked for Respondent but was off work because of an injury. The New Harmony church is about 2 miles from McPherson's home.

At 2 a.m. on June 22, McPherson left New Harmony Church and drove to the terminal. He arrived at 3 a.m. The dispatcher told him that his run scheduled to Clayton, Alabama, had been canceled and another of McPherson's scheduled runs had been transferred to another driver.

McPherson was told to come into the office at 5 p.m. on June 22. He met with Ken Springer, Lanew Barry, and Debby Redding. Plant Manager Lanew Barry told McPherson that he was discharged for a log violation. Plant Manager Barry said that he observed McPherson's truck at the New Harmony Church from 9 until 11 p.m. on June 21. Springer asked McPherson if he had any comment and McPherson replied no.

McPherson testified that before June 21 he had left his truck at New Harmony Church on several occasions.

Planning Manager Brannon Sims denied that he ever permitted McPherson to take his truck home because of a death in the family. Sims agreed that he made special arrangements for McPherson in early 1993. Sims was phoned by McPherson's wife who requested that McPherson be given time off because of a death in the family. Sims removed

McPherson from assignment and when McPherson came in, he asked Sims about him not having a driving assignment the next day. Sims told McPherson that he needed to call his wife. Sims testified that McPherson did not drive his truck home that day. Sims testified that he has never permitted McPherson to take his truck home and cover it by falsifying a log.

According to McPherson, drivers were permitted to take their trucks home until after the Union was elected. Then Respondent sent out a letter that the drivers could not take their trucks home. In March 1993, McPherson was disciplined for a log violation even though he had made similar mistakes on his log before the Union was elected and had not been disciplined. In June 1992, McPherson was accused of threatening to blow up the plant and he was disciplined. McPherson denied that he threatened to blow up the plant. On another occasion he was suspended for 1 day because of a log violation. That violation was for exceeding 70 hours in 8 days.

On rebuttal Ricky Howard testified that on more than one occasion, he took his Rock-Tenn truck home with him while he was on layover.

On June 17, 1992, Ricky Howard had to drive to Marietta, Georgia, to repair a flat on his Rock-Tenn truck. Howard phoned Debby Redding and told her what had occurred and that he was going to take his layover at his home in Marietta because he was out of driving hours. Redding told Howard that would be fine. Howard logged out to Marietta and turned his log in to Respondent.

On June 22, 1993, Howard phoned Debby Redding and asked to take his layover at home in order to see his son's baseball game. Redding told Howard to hold the line while she spoke with someone else. When she returned to his line, Redding told Howard that would be fine. Howard logged in his layover at Marietta.

In mid-July Howard took another layover at his home. He logged that layover in his log which was turned in to Respondent. Around July 27 or 28, 1993, Howard phoned Redding and asked if he could go to his home to clean up his Rock-Tenn truck so it could be turned in to the lease company in a clean condition. Redding granted his request.

Howard was never disciplined because he logged in for a layover at Marietta.

McPherson testified that he did have an 8-hour layover on the night of June 21, but he admitted that he did not stay in Cartersville, Georgia, from 5:15 p.m. until midnight as is shown on his log. McPherson also testified that he had not committed any offense before for which he was not disciplined.

Lynn Rhodes testified that he served on the union negotiating committee until October 1992. During negotiations McPherson gave the Union some documents from the time he was an independent contractor with Respondent, for use in negotiations. During July 1992, some of the documents provided by McPherson were given to the Respondent. Respondent Attorney Larry Forrester asked where Rhodes got those documents. Rhodes replied that it did not matter where he got the documents. Later Ken Springer asked Rhodes if he got the documents from McPherson. Rhodes replied no.

McPherson also told Rhodes that the drivers for Respondent in their Chattanooga terminal were earning 14 cents more per hour than the Norcross drivers. The local in Chattanooga verified that information and the Union brought it up to Respondent during negotiations.

Findings

In consideration of the McPherson allegations I shall first examine whether the General Counsel proved a prima facie case. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

The Board in *Electromedics*, supra at 937, set out four criteria that must be established for me to find that the General Counsel had proved, prima facie, that Respondent was motivated by employees' union activities in terminating an employee.

The record established that McPherson engaged in union activities including serving on the union negotiating committee. However, there was no showing that Respondent was aware that McPherson was elected to the union negotiating committee on June 20, 1993. He was discharged on June 22, 1993.

After the Union was elected, Respondent's management identified McPherson as one of the drivers who supported Respondent and opposed the Union. The evidence is undisputed that General Manager Springer was very upset when he learned that McPherson had supported the Union. Additionally the evidence was not rebutted that Respondent expressed belief that McPherson had furnished the union negotiators with documents they used against Respondent during bargaining.

The record also proved without dispute, Respondent's union animus and, more specifically, its animus to McPherson's union activities. That point was established by the undisputed testimony of Dan Norsworthy. As shown above Norsworthy testified that Ken Springer was very upset to learn that McPherson had voted for the Union. The action against McPherson 2 days after he was placed on the union negotiating committee and a few days before the first negotiating session held in 1993, would tend to discourage membership in a labor organization. Moreover, as shown below, four employees took action on July 13—some 3 weeks after McPherson was discharged—to withdraw their support for the Union. That action by the employees along with the timing of McPherson's discharge, tends to show that McPherson's discharge could have added to the motivation behind the employees efforts to remove the Union.

The evidence shows that before the Union was elected Respondent extended assistance to its drivers. When the Union was elected some of that assistance was withdrawn. The testimony of Dan Norsworthy was not rebutted as to those matters and I credit his testimony of the basis of his demeanor and the full record.

Additionally, the testimony of McPherson and Ricky Howard, tended to show that McPherson was treated in a disparate manner. That evidence illustrated that drivers were routinely permitted to take their trucks home. There was no showing that anyone other than McPherson, had been disciplined because they took layovers at home with their trucks. However, as shown below, a thorough examination of the evidence revealed that the differences in the treatment of McPherson was actually because McPherson, unlike Ricky Howard, had falsified his log.

But for the failure to show that McPherson was treated in a disparate manner, I would have found that the General

Counsel proved the four elements as outlined in *Electromedics*. I shall go on to consider whether Respondent would have discharged McPherson in the absence of his protected activities even though the record did not fully support a prima facie finding of a violation.

In light of *Wright Line*, supra, I shall examine the record as to whether Respondent proved it would have discharged McPherson in the absence of his protected union activities.

Respondent contends that it discharged McPherson for falsifying his log. For the night of June 21 McPherson's log showed that he remained in Cartersville, Georgia, from 5:15 p.m. until midnight. In fact McPherson was met in Cartersville and the truck was driven to Ducktown, Georgia, by Bob Buchanan. McPherson estimated that Ducktown was 26 or 27 miles from Cartersville. The truck was parked 2 miles from McPherson's home. When he discharged McPherson, Lanew Barry told McPherson that he had observed McPherson's truck parked at New Harmony church from 9 to 11 p.m. the night before. McPherson admitted that he had falsified his daily log to show that his layover was in Cartersville when he and his truck were actually in Ducktown. The truck was parked at the New Harmony church during the times cited by Plant Manager Lanew Barry.

As shown above the General Counsel called Ricky Howard. Howard testified that he received permission to take his layover at his home in Marietta, Georgia, on June 17 and 22, during mid-July, and again around July 27 or 28, 1993. However, as Respondent pointed out in its brief, Howard's logs correctly reflected that he was in Marietta on those occasions.

McPherson testified that even though drivers were allowed to take their trucks home during layovers before the NLRB election in June 1992, that privilege was withdrawn after the election. Also, McPherson testified that he took layovers and was permitted to show Cartersville, Georgia, even though he was not in Cartersville. However, as to those matters McPherson did not show the applicable logs. Moreover, McPherson admitted on cross-examination that there was not enough parking room for the trucks at Rock-Tenn during the time the drivers were permitted to take their trucks home. After the parking area was paved and there was room for all the trucks, the drivers were not permitted to take the trucks home.

As to the logs showing Cartersville when, in fact, the layovers were not in Cartersville, there was no showing that Respondent ever learned that was occurring, before the incident on June 21.

Here, the evidence is not in dispute that Lanew Barry saw the truck parked at New Harmony church. Other than McPherson's testimony, which was not supported by other evidence, there was no showing that Respondent ever knowingly permitted McPherson to falsify his log.

McPherson also admitted that Debby Redding sent a memo to the drivers on October 9, 1992, specifying a new policy on log violations. That policy statement shows that minor violations would be taken off the drivers record but that major violations would remain. The Debby Redding memo also included the following statement:

> ANY FALSIFICATION OF A LOG CONCERNING THE WAY IT WAS RUN WILL RESULT IN IMMEDIATE TERMINATION.

The Union argued that Respondent engaged in illegal activity by changing its policies. However, that was not proven by the evidence. As shown above McPherson admitted that the drivers were permitted to take trucks home before the parking area was paved. Before then there was not enough room to park all trucks. After the paving and increase in room, all the trucks could be parked at Respondent's facility and Respondent changed its practice regarding taking the trucks home. Moreover, unlike the situation regarding Ricky Howard, there was no showing that McPherson had asked to take his truck home. It was Respondent's contention that McPherson did not leave the truck where he asked to leave it and that contention was supported by the evidence. I find that the evidence did not support the contention that McPherson was treated in a disparate manner. There was no showing that Respondent learned that any other driver falsified his log and was not discharged.

The record fully supported Respondent's contention that McPherson falsified his log and was discharged for that offense in accord with established practice. I find that Respondent proved that Lamar McPherson would have been discharged in the absence of his protected union activities. I find that Respondent did not engage in illegal conduct by discharging McPherson. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

Gary Spence:

As shown above, Gary Spence was a truckdriver with Respondent until July 8, 1993. On July 7, Spence was told by Ricky Howard that Respondent planned to lay off the drivers. On July 8 Spence talked with Planning Manager Brannon Sims. Spence told Sims that he had heard that the drivers were going to be laid off. Sims told him that he had heard the same thing. Spence asked if Ken Springer wanted him to work until the end of the month or just leave and look for another job. Sims told Spence that he would check with Springer while Spence was on his run. Spence returned from his run around 5 p.m. Sims and Transportation Manager Debby Redding came out. Sims told Spence that he had talked with Springer. He told Spence that he could work until the end of the month or leave right then. That it did not make any difference. Sims confirmed that the decision to lay off the drivers was a final decision. Spence told them that he could go ahead and leave then if it did not make a difference. Debby Redding asked is this your last day then. Spence told them that he would stay if they needed him but if not, that would be his last day.

Brannon Sims is Respondent's planning manager at Norcross. Sims testified that he talked with Spence on the morning of July 8. According to Sims, Spence called him over to his truck and told Sims that ''I guess I'm going to hang it up. I guess I'm just going to hang it up. From what I understand it's going to happen anyway at the end of the month.''

Sims testified that he responded, ''Gary I don't know anything about that but I don't think you really want to quit.''

Spence replied, ''Well, you know, I just think it's probably the best thing to do.'' Sims then said, ''Gary, what time are you going to be back in?'' Spence replied around 5 or

6 o'clock. Sims told Spence to think about it and they would talk when Spence came back in.

Sims did not recall Spence asking him to check with Ken Springer and find out whether or not the drivers would be laid off on July 31. Sims did check with Ken Springer and Debby Redding after his conversation with Spence.

Sims told Springer that Spence had said he had heard that it was inevitable that they weren't going to have a job. Springer told him that he did not know anything about that; that it was still on the table being negotiated.

Sims agreed that he and Debbie Redding talked with Gary Spence when Spence returned to the terminal. Sims testified:

> Myself and Debbie Redding met Gary. Gary was still in the parking lot. He was still in his truck and I went out and Gary said that—you know, I didn't really get a chance to say anything. He said, ''I thought about it. I'm just going to go ahead and resign. He said, It's Thursday, it's the end of the pay period. Said, you know, if I went ahead and ran another day, said, it would screw it up. He said, it's nice and neat, it's the end of the week.''

Sims replied, ''Well, okay. I hate to lose you.''

Sims testified that he learned that the decision had been made to go to Silver Eagle as a dedicated carrier on the afternoon of July 13. Sims learned of the decision in a meeting with John Morrison, Lanew Barry, and Debby Redding. That meeting was held between 4 and 6 that afternoon. Sims denied that he heard on or before July 8 that Respondent was going to terminated its trucking fleet, other than what he was told that day by Spence.

Spence returned to the terminal to pick up his final check on July 20 or 21. Debby Redding asked if he would sign a paper stating that he had resigned. Spence agreed but told Redding he would put down that he had resigned because he was being laid off. Redding left then returned and told Spence that he did not need to sign a paper saying that he resigned. That testimony of Spence was not rebutted.

Spence testified that he was never told that he would receive severance pay if he stayed on with Respondent until the end of July. He had already quit and did not attend the meeting Respondent held with the drivers on July 14.

Findings

There is no dispute but that Gary Spence resigned on June 8. The General Counsel contends that resignation was the result of Respondent not bargaining with the Union over its decision to subcontract bargaining unit work.

The General Counsel argued that a constructive discharge is not really a discharge but, rather, a quit that the Board treats as a discharge in view of the surrounding circumstances. *Remolding by Oltmanns*, 263 NLRB 1152, 1161 (1982). The General Counsel must satisfy a two-prong test to establish constructive discharge: ''First, the burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign.'' *Columbia Textile Services*, 293 NLRB 1034, 1047 (1989).

Testimony regarding Spence's conversations with Brannon Sims is in dispute. Spence testified that Sims confirmed on July 8 that he had heard that the drivers would be laid off at the end of July. Sims testified that Spence told him that he understood the drivers would be laid off at the end of the month but that he told Spence he did not know anything about that.

I have considered the full record and the demeanor of the witnesses. As shown below I find that I cannot credit Sims' testimony that he did not tell Spence that he had heard that the drivers would be laid off at the end of July.

On the one hand, the record appears to support the testimony of Brannon Sims. On July 6 Respondent told the Union that it had not made a decision as to whether it would subcontract the trucking operations and lay off the drivers. It appears somewhat unlikely that a supervisor would take a different position on July 8 and confirm to an employee that the decision had already been made.

Respondent pointed to the testimony of Ricky Howard and Spence's affidavit for support that Sims was the more credible witness. Howard testified that he did not tell Spence that Respondent had made a decision to lay off all drivers. Instead Howard told Spence that it was a thought by Respondent to subcontract the trucking operations and lay off the drivers.

As he testified at trial, however, Spence in his affidavit, testified that he quit because Howard told him Respondent was going to lay off the drivers and Sims confirmed that was the case.

Favoring crediting Spence's testimony, is the admission by Sims that he and Spence did talk and that the subject of laying off the drivers at the end of the month, did arise during that conversation. Sims testified that Spence made that statement but, according to Sims, he never did tell Spence that Respondent had not made the layoff decision.

As to the dispute as to what Howard told Spence on July 7, the evidence is not in dispute that Spence indicated to Sims on July 8, that he understood the drivers would be laid off at the end of the month. It appears from that testimony that regardless of what Howard told Spence, Spence came away from that conversation with the thought that the drivers would be laid off at the end of July.

As shown above, a paralegal from Respondent sent a draft copy of agreement for contract carriage to Silver Eagle on July 7, 1993. That along with comments made to the Union during the July 6 negotiating session to the effect that the union could not overcome the $200,000 Respondent stood to benefit from using a dedicated carrier, tend to show that Respondent had already made the decision to subcontract all bargaining unit work. That tends to support Spence's version of his conversations with Sims on July 8.

Additionally, as shown above, Spence testified that when he returned to pick up his final check on July 20, Debby Redding asked him to sign a statement that he had resigned. When Spence told her he would write in that he resigned because he was being laid off, Redding withdrew her request. Respondent did not call Redding and Spence's testimony is unrebutted. Redding did not testify regarding the actual resignation by Spence. Both Redding and Sims were present on that occasion. Redding's failure to testify tends to support a conclusion that Spence was a truthful witness.

Respondent argued that Spence's prehearing affidavit was inconsistent with his testimony. Respondent contended in its brief that Spence's affidavit is totally devoid of any reference that anybody told Spence that the decision to lay off the

drivers was definite. However, I notice in Spence's affidavit on the first page the comment:

> [O]n or about July 8, 1993, when I quit my employment at the Company because Brannon Sims, Manager, told me that all of the Company's drivers including myself were going to be laid off at the end of the month (on or about July 31, 1993).

Additionally at page 3 of the affidavit, Spence made the following comment:

> I asked Brandon [sic] Sims ''Brandon, I hear that Rock Tenn is laying off all of the drivers at the end of this month.'' Brandon Sims said, ''I heard the same thing that you did that all of the drivers are going to be laid-off at the end of July.''

The record and my impression of demeanor, demonstrates to me that Spence was the more credible witness between himself and Brannon Sims. I am persuaded that Gary Spence testified truthfully. I was impressed with his demeanor. Spence's testimony illustrated that he resigned because he understood he would be laid off along with the other drivers, on July 31.

The Union argued that Spence was constructively discharged because of Respondent's unilateral termination of the trucking operation and the layoff of all truckdrivers. *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561 (1979).

Respondent contends that the evidence failed to prove that it made the decision to subcontract its trucking operations to Silver Eagle before July 13. As shown above I credit the testimony of Gary Spence. Moreover, other evidence, including the July 13 letter which Respondent accepted as a petition to reject the Union, illustrated that the drivers were aware that Respondent had decided to subcontract the trucking operation. The letter referred to ''the decision that has recently been made,'' in referring to Respondent's decision to subcontract the trucking operations and lay off the drivers.

Additionally, the evidence regarding the July 6 negotiation session illustrates that Respondent had already made the decision to subcontract its trucking operations, before that session. For example Respondent told the Union that the Union could not offset an estimated $200,000 savings by it subcontracting to Silver Eagle. That statement showed that Respondent knew that the Union would not offer anything in negotiations that would change Respondent's decision to subcontract.

Spence's conversations with Brannon Sims on July 8, tended to show that Respondent unilaterally decided to subcontract the trucking operations and lay off the drivers. As shown above, I find that decision was a unilateral decision made in violation of Section 8(a)(1) and (5) of the Act.

The General Counsel argued that the testimony of Dan Norsworthy illustrated that Respondent changed working conditions to make life miserable for the drivers. However, the record failed to show that any change in working conditions mentioned by Norsworthy, contributed to the resignation by Spence.

The testimony of Gary Spence proved that the sole reason for his resignation was the pending layoff of all the truckdrivers on July 31. In line with the General Counsel's argument I shall consider whether Spence was constructively discharged. *Remolding by Oltmanns*, supra; *Kogy's Inc.*, 272 NLRB 202 (1984); and *Columbia Textile Services*, supra.

In *Kogy's, Inc.*, supra, the Board stated:

> The Board has held that a two-pronged test must be met to establish a constructive discharge: ''First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign''; second, the resultant burdens must be due to the employee's union activities.
>
> In the instant case, we do not find that the work rules imposed such difficult or unpleasant burdens on employees that they were compelled to quit.

Respondent argued that even if Spence's testimony is credited, the record failed to show that Spence was constructively discharged. Respondent argued that the General Counsel failed to show that ''burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign,'' and that the General Counsel failed to show ''those burdens were imposed because of the employee's union activities.'' *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). Respondent also cited *American Licorice Co.*, 299 NLRB 145 (1990); and *Avecor, Inc.*, 296 NLRB 727 (1989).

Respondent argued that Spence's working conditions did not change and the General Counsel failed to show that the statements made to Spence by Sims, were made because of Spence's union activities. Respondent also pointed out that other drivers including Ricky Howard, did not resign because of any pending layoff. Respondent cited *Avecor, Inc.*, supra, for the position that the conditions complained of were applicable to all employees and, for that reason, did not constitute constructive discharge.

In *Remodeling by Oltmanns*, supra at 1161–1162, two factual situations were found to lead to constructive discharge:

> In the first, with knowledge of its employees' participation in union or other protected concerted activities, an employer harasses the individual to the point that his job conditions become intolerable and, as a result, the employee quits. In such circumstances, a nexus between the working conditions and the individual's protected activities must be shown and the imposed burdens must be intended to cause an altering of the worker's working conditions. If both factors are present, a constructive discharge will be found. In the second factual situation, an employer confronts an employee with the Hobson's choice of either continuing to work or foregoing the rights guaranteed to him under Section 7 of the Act. In such a circumstance, his choice must be clear and unequivocal and not left to inference. [Citations omitted.]

I agree with the argument advanced by Respondent on the issue of constructive discharge. The General Counsel failed to meet the two-pronged test outlined in *Kogy's, Inc.*, supra. The evidence failed to show that Respondent made its decision to subcontract and lay off the drivers, in order to harass Gary Spence because of his union activities nor did the Gen-

eral Counsel satisfy the conditions necessary for me to determine that Spence was presented with a Hobson's choice. Spence was not presented with the choice of quitting or foregoing Section 7 rights. I find that the General Counsel failed to prove that Gary Spence was constructively discharged.

However, despite the fact that Spence was not included in the allegation that the July 31 layoff occurred because of Respondent's unlawful action in subcontracting all bargaining unit work and because of Respondent's union animus, I am convinced that his job was terminated because of that action. I find that issue was fully litigated. The credited evidence shows that Spence quit his job because of the pending layoff. Respondent accepted his resignation under that condition. Subsequently, on July 20 or 21, when Spence picked up his paycheck, he was asked to sign a statement saying he had quit. Again Spence made it clear that he had quit only because he was going to be laid off with the remaining drivers. The testimony by Spence regarding his conversation with Debby Redding was not rebutted.

As shown above, I find that Respondent engaged in conduct in violation of Section 8(a)(5) and (1) by telling Spence on July 8, that it would lay off all the drivers at the end of July. The credited testimony of Gary Spence proved that Respondent accepted Spence's resignation as being based on its impending layoff of all the drivers.

In the absence of Respondent's unlawful action in unilaterally subcontracting unit work and laying off all unit employees, Gary Spence would not have resigned. I find that Spence was terminated because of Respondent's conduct in violation of Section 8(a)(1) and (5) of the Act. However, it is apparent that Spence elected to take his layoff early for his own purpose. Therefore, I shall not direct backpay for Spence before the layoff of July 31, 1993.

CONCLUSION OF LAW

Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting its trucking operations; by telling its employee that it would lay off unit employees even though it was bargaining with the Union regarding that issue; by withdrawing recognition of the Union as the employees' collective-bargaining representative; and by laying off all its bargaining unit employees and Respondent thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and by closing its trucking operations and laying off and refusing to recall, all bargaining unit employees including Gary Spence, Howard E. Binkly, Harold Fields, Ricky Howard, Kenneth McCoy, Phillip McCoy, David Mason, and Julian C. Walton Jr., I shall order Respondent to restore the status quo ante conditions that existed on July 31, 1993, at the time of its unlawful layoff of all bargaining unit employees, by reopening its Norcross-based trucking operations and restoring the employees to their former positions; for Respondent to offer Spence, Binkly, Fields, Howard, Kenneth McCoy, Phillip McCoy, Mason, and Walton immediate reinstatement to their former positions or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. I further order Respondent to make Spence, Binkly, Fields, Howard, Kenneth McCoy, Phillip McCoy, Mason, and Walton whole with interest, for any loss of earnings suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against Spence, Binkly, Fields, Howard, Kenneth McCoy, Phillip McCoy, Mason, and Walton, and notify Spence, Binkly, Fields, Howard, Kenneth McCoy, Phillip McCoy, Mason, and Walton in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. *SMCO, Inc.*, supra. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Rock-Tenn Company, Norcross, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Union as the bargaining representative of the employees in the following unit:

> All drivers employed by Respondent at its facility at 4444 South Old Peachtree Road, Norcross, Georgia, but excluding all production employees, clerical employees, sales employees, mechanics, professional employees, guards, and supervisors as defined in the Act.

(b) Refusing to bargain collectively with the Union on request as the exclusive representative of employees in the above-described unit.

(c) Terminating its Norcross, Georgia trucking operations and contracting out the work of its bargaining unit employees without first bargaining with the Union concerning the decision to terminate its trucking operations and contract out that work and the effects of that decision on its unit employees.

(d) Laying off its bargaining unit employees without first bargaining with the Union concerning the decision to lay off its employees.

(e) Telling its employee that it will lay off unit employees at a time when it was negotiating with the Union regarding the decisions that would lead to the laying off of unit employees.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Teamsters Local 728, International Brotherhood of Teamsters, Chauffeurs,

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Warehousemen and Helpers of America, AFL–CIO, as the exclusive bargaining representative of the employees in the unit described above and, if an understanding is reached, embody such understanding in a written signed contract.

(b) Reopen its Norcross, Georgia trucking operation to the status quo ante of July 31, 1993.

(c) Offer to Gary Spence, Howard E. Binkly, Harold Fields, Ricky Howard, Kenneth McCoy, Phillip McCoy, David Mason, and Julian C. Walton Jr. immediate reinstatement to their former positions with full backpay and benefits with interest in accordance with the remedy section of this decision with no loss of seniority or other rights and privileges previously enjoyed, severing all contractual relations, if necessary, with others utilized to perform the work formerly performed by the bargaining unit employees.

(d) Remove from its files any reference to its unlawful layoffs and refusal to reinstate its employees as found herein, and notify them in writing of this, and that the action shall not be used as a basis for future personnel actions.

(e) Communicate orally and in writing to officials of the Union that it has rescinded its decision to withdraw recognition of the Union and, instead, inform the Union that it will honor its bargaining obligation.

(f) Post at its Norcross, Georgia facilities copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''